Part V Key Actors, Ch.29 The International Bar

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From: The Oxford Handbook of International Adjudication
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Content type: Book content
Product: Oxford Scholarly Authorities on International Law [OSAIL]
Series: Oxford Handbooks in Law
Published in print: 01 December 2013
ISBN: 9780199660681

Subject(s):

Choice of counsel — Legal representation, right to — International procedural law

(p. 639) Chapter 29 The International Bar

> "THE lack of a specialized bar before the [Law of the Sea] Tribunal, of a minimum level of qualification in international law, of rules of professional conduct and of an organization entrusted with the task of enforcing them, may...pose a problem."[1]

(p. 640) 1 Introduction

Judge Cot's gently expressed concerns remain valid. Others have been more forthright.[2] The question addressed in this chapter is whether there are structural problems with the "international bar" that may underlie such concerns.

There is no single unified international bar, or even distinct bars in different subject-matter areas or regions. The term "international bar" has no clear meaning, and the international bar has no formal structure. It is used here simply to refer to those lawyers who act as counsel in cases before international courts and tribunals.[3]

We concentrate in this chapter on counsel before the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), and inter-state arbitrations (such as those under Annex VII of the United Nations Convention on the Law of the Sea); but we refer to other courts and tribunals where there are particular points worth noting. We do not address the position of lawyers appearing before international criminal courts and tribunals, to which special considerations apply.[4]

A central issue is whether there are any general principles that apply to the qualification and conduct of members of the international bar. Is there a "common law of international courts and tribunals"[5] in this regard? It seems clear that there is not, at least not yet. Scholars and practitioners have sought to identify a minimum set of ethical standards that, in their eyes, would contribute to the integrity and fairness of international litigation. So an initial question is whether there could or should be a common set of standards, and here some skepticism seems in order. While individual courts and tribunals might seek to prescribe rules, it is doubtful that they have the power to do so. Also, the states that established the courts and tribunals may themselves be unwilling to do so. In any event, it seems unlikely that general rules could be established across the range of international courts and tribunals.

In addition to a lack of professional standards, members of the international bar need not possess any formal qualifications, rendering the international bar generally unregulated. These two related issues are surveyed in Section 2. However, while (p. 641) the international bar is in theory open to all, Section 3 shows that in practice it consists of a restricted number of litigators with similar characteristics, implicitly excluding others. While the current situation may have proven generally efficient, the chapter concludes with thoughts on how the international bar could and should develop in the future.

2 The Regulation of Legal Representation and Professional Standards

The practice in inter-state disputes is that states are normally represented by agents.[6] These agents are most often officials of the state which they represent, but that is not necessarily the case.[7] Is there a duty also to be represented by lawyers? The texts governing both the ICJ and the ITLOS suggest not. Article 42 of the ICJ Statute requires states to be represented by an agent, yet leaves the assistance of counsel or advocates to the discretion of the state.[8] The Rules of the ITLOS similarly provide that states shall be represented by agents before the tribunal, with the use of counsel or advocates at their discretion.[9]

In national settings, qualifications are meant to ensure a certain level of (continuing) substantive knowledge and professionalism. They attest to the competence of those acquiring them. Nevertheless, only in rare cases have rules been laid down concerning who may appear before an international court, or regulating the conduct of such persons. One such example is the Statute of the Court of Justice of the European Union (EU). Article 19 lays down the qualifications necessary for those representing parties before the EU courts, differentiating between representatives of states and EU institutions, and representatives of other parties (such as individuals). Whereas the former shall be represented by agents (and may be assisted by advisers or lawyers if they so choose), other parties must be represented by lawyers. Only a lawyer authorized to practice in a national jurisdiction may represent or assist a (p. 642) party. University professors may also appear, provided they are nationals of a member state that entitles them to practice law in domestic jurisdictions. Thus, while lawyers appearing before the EU courts must be qualified to practice in a national jurisdiction, states are not required to be represented by accredited lawyers.

On the other hand, neither the Statute nor the Rules of the ICJ or ITLOS say anything about who is qualified to act as counsel and, therefore, appear and plead. For this reason, writers discussing the qualifications of those appearing as counsel before the ICJ tend to write about the qualifications they believe the court expects counsel to possess, rather than their actual qualifications.[10] And while expectations, rather than set rules, are discussed, the literature—with few exceptions—has not thoroughly examined whether these expectations have been met.[11] The matter does not seem to be regulated in inter-state arbitration either. Though qualifications of counsel could be covered in ad hoc arbitration agreements, this does not seem to be done. This may be attributed to notions of sovereignty and the right of a state to choose its representatives as it pleases. The only exception seems to be the ICJ's Practice Directions VII and VIII of February 7, 2002, which touch upon specific issues regarding the nomination of judges ad hoc and agents and counsel.[12] Practice Direction VII states that in the interest of the sound administration of justice, parties should "refrain from designating as agent, counsel or advocate in a case before the Court a person who is sitting as a judge *ad hoc* in another case before the Court." And Practice Direction VIII stipulates that "parties should refrain from designating as agent, counsel or advocate in a case before the Court a person who in the three years preceding the date of the designation was a Member of the Court, judge *ad hoc*, Registrar, Deputy-Registrar or higher official of the Court."

The issue addressed in these Practice Directions may well arise in other contexts. For example, in international investment arbitrations it is common for the same person to act as counsel in one case and arbitrator in another—including where similar issues may arise. This practice has become a matter of controversy, and some practitioners have decided it is inappropriate.

The expectation may be that states will appoint as counsel those possessing the proper qualifications to address the judges or arbitrators, in particular those qualified to appear before the higher courts of their own country or academics from recognized institutions of higher education.[13] Though this is normally the case, the survey conducted in Section 3 shows that this is not always so.

(p. 643) It seems unlikely that specific ethical standards apply widely to members of the international bar. International standards, such as those adopted by the International Bar Association,[14] are addressed to lawyers practicing in national systems. In any event, whether national standards apply to members of a national legal profession, when appearing before an international court or tribunal, would depend upon their precise terms. Whether or not they formally apply, professionally qualified lawyers are likely to be guided by national ethical codes.

In the absence of regulation, international courts and tribunals presumably rely on the informal application of national standards. As one author has written, in the context of the ICJ, "The Court has been able to rely on the assumption that those carrying the legal argument before it…will regard themselves as bound by similar ethical rules and professional obligations as when appearing before their own national courts."[15]

That may be true, but the absence of regulation and agreed standards of conduct may bring about different practices amongst counsel from different legal traditions on various issues of substance, and the recurring need for the bench to be aware and take account of differences in counsel conduct in order to ensure that procedures are fair and equality is guaranteed.[16] For example, divergences may arise regarding preparation of witnesses or *ex-parte* communication with arbitrators.[17]

Without agreed standards, diverging conduct by opposing counsel may create practical difficulties and an inherent unfairness in the proceedings, with differing practices providing one side an advantage over another.[18] These differing practices may become more prevalent as more and more actors resort to international adjudication on an increasing number of issues.[19] In addition to the practical difficulties, the lack of clarity as to which ethical rules apply as a result of the absence of standards regulating the conduct of counsel may eventually jeopardize the legitimacy of (p. 644) the legal system and confidence in international adjudication, in an era of increased public scrutiny.[20]

While ethical standards vary, there are undoubtedly some central principles that ought to apply to all appearing before an international court or tribunal (even those not members of a national bar). One example is the uncontroversial principle at issue in the recent controversy in the pages of the *American Journal of International Law* between Judge Stephen Schwebel and Paul Reichler over Nicaragua's handling of evidence in the *Armed Activities* case: Reichler is surely right to say that "[a]s officers of the Court, we have an ethical obligation not to submit, or to allow a client to submit, false evidence."[21] Another such principle is the importance of not contravening the confidentiality of lawyer-client communications, including when they are obtained accidentally (as may happen if counsel are staying at the same hotel and using the same business center).

Another matter of general standards of counsel and ethics has arisen regarding the distinction between counsel and witnesses. In one case, at the request of one party, the President of an ICJ Chamber decided that a counsel for the other party was to be treated as a witness after attesting to certain points of fact in his pleadings.[22] The counsel then waived any relevant privileges and was cross-examined as any other witness.[23]

A similar issue arose in the *Pulp Mills* case.[24] In its judgment, the court voiced criticism of the conduct of both parties in having individuals attesting to facts also plead as counsel during the proceedings:

> The Court indeed considers that those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court.[25]

The court then hinted at the implications such conduct may have on its treatment of such evidence and its assessment of its impartiality.[26]

In his separate opinion, Judge Greenwood emphasized that such a dual role as expert and counsel blurs the distinction between evidence and advocacy, which is fundamental to the proper conduct of litigation before all courts. To have people (p. 645) involved in the preparation of evidence submitted pleading "as counsel, rather than giving evidence as witnesses or experts, was both unhelpful to the Court and unfair to the other Party."[27]

Challenges to counsel (as opposed to challenges to members of the bench) are understandably rare. Two challenges to counsel were decided upon by arbitral tribunals constituted under the International Centre for Settlement of Investment Disputes (ICSID). In *Hrvatska v. Slovenia*, the claimant challenged a counsel appointed by the respondent who was a barrister at the same chambers as the president of the tribunal.[28] The claimant was notified of the participation of the barrister only shortly before the oral phase. The arbitral tribunal found that the tribunal lacked the explicit power to exclude counsel, and that the parties may seek representation as they see fit, as a fundamental principle.[29] Yet it found an overriding exception to that principle in the principle "of the immutability of properly constituted tribunals" which allows for the disqualification of counsel when a party alters its legal representation in a way that is found to imperil the tribunal's perceived legitimacy.[30] Accordingly, the barrister was excluded from the proceedings.

Two years later, another arbitral tribunal established under the ICSID faced a similar challenge to counsel.[31] In *Rompetrol v. Romania*, the respondent sought to challenge counsel for the claimant on the grounds that he was once employed by the same law firm as the president of the tribunal. The tribunal explicitly refrained from adopting the approach taken in *Hrvatska v. Slovenia*, and questioned whether the powers necessary for a tribunal to preserve the integrity and effectiveness of its proceedings should extend to the exclusion of counsel, where such powers were not explicitly granted to the tribunal.[32]

Without passing judgment on the substance of standards applicable to counsel, the tribunal differentiated between the obligations of an impartial and independent arbitrator, to that of counsel, partial to his or her party, "so long as he does so with diligence and with honesty, and in due compliance with the applicable rules of professional conduct and ethics."[33] The tribunal then commented that it is not uncommon, in disputes involving states, that counsel had professional dealings with arbitrators in other cases; and that any other decision might infringe on the (p. 646) inherent right of the party to choose its own counsel.[34] Finally, the tribunal concluded that regardless of what the correct answers may be to these questions of principle, tribunals should only disqualify counsel rarely, when an undeniable need to safeguard the integrity of the arbitral process exists.[35] The authors submit that this is the correct approach, and that the earlier decision in *Hrvatska v. Slovenia* should be confined to its own particular facts.

One other challenge to counsel took place in an unpublished annulment proceeding under ICSID, of which Doak Bishop spoke in May 2010.[36] According to Bishop, the claimant's counsel was challenged on the grounds that he had represented the respondent some five years earlier in a related proceeding. While the annulment committee stressed that it had no say on the question of the counsel's ethical responsibilities whatever they may be, it took the view that the duty to treat the parties fairly and equally necessarily included the power to ensure that generally recognized principles of conflict of interest and the protection of confidential information were complied with.[37] Recognizing that neither the codes of conduct binding counsel before national jurisdictions nor the Council of Bars and Law Societies of Europe (CCBE) code of conduct were applicable, the committee found that counsel was not in breach of any general principle.[38] Thus, this decision seems in line with the view mentioned above, that some general principles inevitably control counsel's conduct before international courts and tribunals.

In view of this not entirely satisfactory situation, it is not surprising that efforts have been made to devise general ethical standards that could apply to counsel appearing before international courts and tribunals, most notably the International Law Association's "Hague Principles on Ethical Standards for Counsel Appearing Before International Courts and Tribunals."[39] These have been private initiatives, and so far seem to have had little impact. But one may hope that there is at least a growing awareness of the issues, both in arbitration and before permanent courts and tribunals.

Within the wider context of international litigation, developing ethical standards may address the concerns regarding an unlevel playing field amongst counsel and the integrity of the profession and the system. Reliance on qualifications in national jurisdictions on the other hand, even if adopted in all international forums, (p. 647) cannot fully address these concerns. Moreover, if one focuses on the interstate context, given that among the already limited number of counsel that appear before courts and tribunals (see Section 3) not all are necessarily qualified to appear before national jurisdictions, it may indeed be wise to focus more on standards than qualifications which would further limit the ability of newcomers to enter this field of practice.

On the other hand, any move in this direction would have to be reconciled with existing national standards applicable to counsel when acting before national jurisdictions, in one way or another, or else issues of lawyers simultaneously bound by differing ethical standards may be exacerbated.

Lacking regulation, one would expect a variety of people from different backgrounds to be members of the international bar. Section 3 surveys, to the extent possible, who have been acting as international litigators in the past 15 years.

3 Who Acts as Counsel before International Courts and Tribunals?

Who makes up what Alain Pellet refers to as the *barreau invisible* or *barreau occulte*—the "invisible bar" or "hidden bar"—of international counsel? Very little has been written on this question. In an article from the late 1990s focused mainly on the preparation of a case before the ICJ, Pellet himself briefly discussed the identity of those appearing before the Court in the 12 preceding years (1986–1997), giving some "not particularly scientific statistics." He found that there was a small ICJ "mafia" that are trusted by states to represent them before the court as counsel. He identified six British and four French nationals within this core group, and noted the predominance of law professors and of men

as opposed to women. Pellet acknowledged that the international bar—insofar as it relates to the ICJ—was a quasi-monopoly that was hard to join.[40]

This section will try to present a contemporary profile of "members of the international bar" over a 16-year period, from 1997–2012. At a panel held during the American Society of International Law annual meeting in 2012, one participant said:

> (p. 648) The problem is this: the universe of lawyers who get to argue on behalf of states before the ICJ or ITLOS, or in inter-state arbitrations, is relatively small, and almost all are older white men from Europe and North America.[41]

Based on a survey of contentious cases and advisory opinions before the ICJ and ITLOS, and inter-state cases administered by the Permanent Court of Arbitration (PCA), over the last 16 years, we examined whether such impressions, shared by many participants and observers, are correct. The aim was to see who appeared as counsel in contemporary inter-state litigation, and what characteristics they shared. When analyzing representation in advisory procedures, oftentimes the precise role of those representing a state or international organization is not specified in the official records. Therefore only those presenting substantive arguments have been included. For example, the survey only included agents who addressed points of substance in their oral presentations.

Relying on publicly available information (mainly the information provided by states and then appearing in the verbatim records and judgments) the sex, nationality, occupation, and qualifications of those appearing were compiled, to the extent possible. The results and conclusions do not purport to provide a precise statistical analysis but rather reflect general trends.

During the period examined (1997–2012), agents and counsel were listed in 33 contentious cases and three advisory opinions before the ICJ. Fifteen contentious cases were heard by ITLOS and one advisory opinion. Also during that period, a list of agents and counsel were provided in eight inter-state arbitrations under the auspices of the PCA (including those which have yet to reach the oral phase). In total, 60 cases were examined. It was found that 601 people were listed as agents or counsel in these cases, with 375 of them making oral presentations.

A closer look at the list of counsel is telling. Most were nationals of the party for whom they were acting—or of the state they represented in advisory proceedings—and appeared as counsel only when their own state engaged them. Such persons may well be taken on for particular reasons and not for their expertise as members of the international bar.[42] In fact a much smaller group of individuals was engaged by a state to act as counsel—and occasionally as agents—when they were not nationals of that state. One author has referred to this group as those who:

> (p. 649) ...represent a variety of foreign states other than their own governments, who are well-known to the Judges and Registrar of the Court, who know how things work out in practice, and who understand by experience the difficulties, pitfalls and tricks of the trade.[43]

In the cases surveyed, 129 counsel, or just under 20 percent, were persons representing a state other than that of their nationality.

Within this core group few appear repeatedly as counsel, suggesting that this field of law remains a limited group of people, and breaking into the field—as well as staying in it—continues to be difficult. Of the ten counsel with most appearances, eight were academics (though most of these were also practitioners), six pleaded exclusively in English and one in both English and French. The woman who appeared most had appeared only four times and was also acting as agent in those instances. A look at the most recent cases heard before

the ICJ shows that the vast majority of counsel engaged by the parties had previously pleaded before the court, some several times.

Are there any characteristics shared by this core group of counsel? The overwhelming majority are from what could be labeled the “West” (Western Europe, the United States, Australia, Canada, New Zealand), practitioners and academics alike. Non-national counsel from other countries who have appeared in the cases surveyed are few: the authors have counted only seven such counsel, of whom only five pleaded in the cases surveyed. Within this small number of individuals, at least three have links to academic institutions in Western countries.

These findings tend to confirm the impression that the world of inter-state litigation is dominated by a small group of people. While international litigation had been a scarce and mainly Eurocentric occurrence in the past, it has become a more regular and global phenomenon, involving states from all regions. This trend has yet to be fully reflected in the characteristics of the international bar. As can be inferred from Pellet’s personal account, this may have to do with the fact that those that join this circle, while knowledgeable in their own right, are often personally acquainted with those already practicing in inter-state litigation.[44] Under the circumstances, it is not easy for newcomers to join the international bar. This difficulty of “admission” is not only unfair to potential litigators—first and foremost those that do not share the characteristics of this group—but possibly denies states representation by those most competent to act as counsel. However, the limited access is probably in large measure explained by the reluctance of states to include less well-established figures among their counsel.[45]

(p. 650) 3.1 Gender

One thing that stands out is the predominant number of males amongst counsel. Of the 601 counsel and agents, only 67 were female. Of the 375 making oral presentations, 41 were women. Thirteen of the 120 agents were women. That is, in each case, just over 10 percent. A slightly higher percentage of women took part in advisory proceedings. Thirteen of 84 individuals representing the state (or an international organization) in these procedures were women, about 15 percent.

3.2 Language

Another aspect examined was the language used by counsel. It should be noted that while pleaders before the ICJ and ITLOS may normally plead in either of the two official languages, English or French, ad hoc arbitrations may specify one language in which all proceedings will take place.[46] In the cases examined, 235 counsel addressed the courts or tribunals in English whereas 121 addressed them in French, a 2:1 ratio. Nineteen made oral pleadings in both languages, half of them agents of the states. English was the only language used in all of the PCA inter-state cases with publicly available records of oral pleadings. When looking solely at ICJ cases, the differential between the use of English and French is slightly lower, with 184 speakers addressing the Court in English and 105 in French, a 1.75:1 ratio.

Language differences may also relate to differences in style between pleaders. This element, along with others such as a common law or civil law approach to pleading, contributes to differences in style, emphasis, and terminology.[47] There may be a conscious effort to include in legal teams both civil and common lawyers, and both English and French speakers, particularly before the ICJ.[48]

(p. 651) 3.3 Academics and practitioners

Whereas in national forums only qualified members of the profession can appear before local courts, those appearing before international courts and tribunals may be professionally qualified, but this is by no means always the case, especially among academics. And, within the academic circles, some who have pleaded are not yet professors, but are still pursuing academic titles (such as doctoral students). Historically, the participation of academics in international adjudication may stem from the days when such adjudication was a rare event, which allowed full-time professors to appear occasionally as counsel. Indeed, it may be that in those days international law was largely an academic field of law, not one for professional litigators.[49] Nowadays, the lack of a qualification requirement in the forums examined leads to an interesting split in the professional background and qualifications of counsel. According to the available information concerning 271 counsel, there is essentially an equal split between academics and practitioners. Though some academics were listed as members of a country's bar or as qualified counsel on a national level, many were not listed as possessing such credentials.[50] In any case, while in most national legal systems the split between practicing lawyers and academics is visible, the line dividing academics and practitioners within the international bar is blurred, if it exists at all.

3.4 Fragmentation and specialization

Although many ICJ cases in recent years have dealt with maritime delimitation, the establishment of ITLOS as a specialized venue for the law of the sea has opened somewhat the international bar in inter-state disputes to new members. For example, of the counsel appearing in the eight ITLOS cases concerning the prompt release of vessels, only three also participated in the other cases surveyed. Thus, the establishment of a new specialized forum may open the international bar to newcomers, to a certain extent. At the same time, some negative reactions surfaced when certain counsel were viewed as unfamiliar with the practices and procedures of the forum before which they were appearing.[51]

(p. 652) 3.5 Newcomers

The number of counsel engaged by states is limited, and those within that group tend to share the characteristics mentioned above. Nevertheless, there seem to be a few ways in which a newcomer can enter the group and develop a career as counsel before international courts and tribunals. First, a characteristic of many counsel mentioned above is that they are academics as well as practitioners, perhaps reflecting the rather academic nature of public international law. This avenue of joining a class of litigators through the academic world seems uncommon in the national context. Second, much like other fields of law, some counsel are partners or associates in law firms or members of chambers and *cabinets* which specialize, at least to some degree, in international litigation before courts and tribunals. Third, some counsel first appeared in inter-state disputes as agents or representatives of their state of nationality, later building on that experience and pleading on behalf of other states. And fourth, some started as assistants to counsel.[52] Governments need to appreciate the advantages of having a team that mixes "experienced Counsel who can avoid worrying slips and have solid know-how and other able international lawyers who can bring 'new blood' and new ideas."[53]

4 Conclusions

As Judge Cot said in the *"Grand Prince"* Case, "[l]awyers play an irreplaceable role before international tribunals in aiding the administration of justice."[54] On the whole, international justice has been well served by the lawyers that appear in the various courts and tribunals. They are dedicated to their profession, to presenting each case to the best of their ability on behalf of their client, while feeling at least to some degree that they owe allegiance also to the court and more broadly to the international legal system. At the same time, the current

situation is not without its problems. We have highlighted two in this brief overview, the lack of common ethical standards, and the narrow pool from which counsel are chosen. However, neither problem should be exaggerated. The pool is inevitably widening with the growth in litigation. And there seems to be a growing awareness of the issues, which itself should lead to improvements. As one author has written:

> more attention will certainly have to be devoted to the question whether the "Bar"—the loose collectivity of persons engaged by States to advance their legal and factual argument in (p. 653) cases before the Court (including in advisory proceedings)—requires some greater degree of organization and regulation, on the basis that this has shown itself in all legal cultures to be a necessary element of a mature judicial system.[55]

Research Questions

1. Should the "international bar" be regulated? Should international courts rely on national qualifications and standards, or should specialized rules and standards be conceived?

2. In the absence of applicable standards, do international courts and tribunals have an inherent power to exclude a state-appointed counsel, and under what conditions should they do so? What standards should these bodies apply?

3. How would regulating the international bar affect its composition?

4. Would the international judicial system benefit from expanding the international bar? Should and could steps be taken to open the field to under-represented groups?

Suggested Reading

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Footnotes:

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1 Judge ad hoc Cot, "*Grand Prince" (Belize v. France) (*Prompt Release, Judgment of April 20, 2001) ITLOS Reports 2001, 17, para. 13. In the original French: "L'absence d'un barreau spécialisé devant le Tribunal, d'un niveau de qualification minimum en droit international, de règles de déontologie et d'un organisme chargé le cas échéant d'un rappel à l'ordre peuvent néanmoins poser problème."

2 See, e.g., Judge Oda's reference, to which Judge Cot drew attention, to "ambitious private lawyers" in his Declaration in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Provisional Measures) [2000] ICJ Rep 111, 131–3.

3 We do not cover those who act as agents, as they raise distinct issues (Oda, note 2), unless they also act as counsel. Sir Franklin Berman, "Article 42" in A Zimmermann et al., (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012) 1083. Nor do we cover those lawyers who appear before international courts and tribunals as advisers or experts or in any capacity other than that of counsel.

4 For more on those appearing before international criminal courts and tribunals, see, in this handbook, Heller, Ch. 31 and Gibson, Ch. 32.

5 C Brown, *A Common Law of International Adjudication* (Oxford University Press 2007).

[6] S Rosenne, *The Law and Practice of the International Court of Justice 1920–2005* (4th edn, Leiden, Boston, MA: Martinus Nijhoff 2006) 1119, 1132–7.

[7] Berman, note 3, at 1082.

[8] Statute of the International Court of Justice (adopted June 26, 1945, entered into force on October 24, 1945) 33 UNTS 993, Art. 42.2. (Hereafter ICJ Statute.)

[9] ITLOS Rules of the Tribunal (ITLOS/8) (as amended on March 17, 2009), Art. 53. <http://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf> accessed July 31, 2012.

[10] Berman, note 3, at 1084.

[11] Several examples of judges expressing their dissatisfaction with the level of advocacy are given in A Sarvarian, *Professional Ethics at the International Bar* (Oxford University Press 2013) Chs IV and V. See Judge Cot, separate opinion, *M/V "Louisa" Case (Saint Vincent and the Grenadines v. Spain)* (Judgment of May 28, 2013), ITLOS Reports 2013.

[12] The Practice Directions, which supplement the Rules of the Court, are available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0> accessed July 29, 2012.

[13] Berman, note 3, at 1084.

[14] International Bar Association, "IBA International Principles on Conduct for the Legal Profession," adopted on May 28, 2011 by the International Bar Association, <www.ibanet.org/Document/Default.aspx?DocumentUid=1730FC33-6D70-4469-9B9D-8A12C319468C> accessed July 31, 2012. It does not appear that the authors of this document had in mind the position of counsel before international courts and tribunals. Nevertheless, some of its principles may offer useful guidance, such as Principle 2 (Honesty, integrity, and fairness).

[15] Berman, note 3, at 1084.

[16] J Paulsson, "Cultural Differences in Advocacy in International Arbitration" in D Bishop and EG Kehoe (eds), *The Art of Advocacy in International Arbitration* (2nd edn, New York: Juris 2010) 15–21; CA Rogers, "The Ethics of Advocacy" in Bishop and Kehoe (eds), *The Art of Advocacy* 52–6.

[17] Rogers, note 16, at 52–4.

[18] Rogers, note 16, at 55; see also DF Vagts, "The International Legal Profession: A Need for More Governance?" (1996) 90 AJIL 250–61; D Bishop, "Ethics in International Arbitration" (Keynote Address at the XXth International Council for Commercial Arbitration Congress, May 26, 2010) <www.arbitration-icca.org/media/0/12763302233510/icca_rio_keynote_speech.pdf> accessed July 31, 2012.

[19] G Born, "A Code of Conduct for Counsel in International Arbitration" (November 16, 2010) Kluwer Arbitration Blog <http://kluwerarbitrationblog.com/blog/2010/11/16/a-code-of-conduct-for-counsel-in-international-arbitration> accessed July 31, 2012; Sarvarian, note 11, at Ch. II.

[20] Rogers, note 16, at 63–4; Bishop, note 18, at para. 10–11; Sarvarian, note 11, at Ch. II.

[21] PS Reichler, "The *Nicaragua* Case: A Response to Judge Schwebel" (2012) 106(2) AJIL 316. But see WM Reisman on the "Shawcross dilemma" in WM Reisman, "The Quest for World Order and Human Dignity in the Twenty-first Century: Constitutive Process and Individual Commitment" (2012) Hague Recueil, Vol. 351, Ch. XV (International law as a profession: dilemmas of identity and commitment).

[22] *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)* (Judgment) [1989] ICJ Rep 15, at 19.

[23] *Elettronica Sicula S.p.A. (ELSI)*, note 22, at 19; Berman, note 3 at 1087, fn. 62; Rosenne, note 6, at 1134–5.

[24] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010] ICJ Rep 14.

[25] *Pulp Mills*, note 24, at 72, para. 167.

[26] *Pulp Mills*, note 24, at 72–3, para. 168.

[27] *Pulp Mills*, note 24, at 72–3, para. 168; Greenwood Sep. Op., at 231, para. 27.

[28] *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* (ICSID Case No. ARB/05/24) (Order Concerning the Participation of a Counsel of May 6, 2008), <http://icsid.worldbank.org/ICSID/ FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC950_En&caseId=C69> accessed July 29, 2012.

[29] *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, note 28, at 10, paras 24–5.

[30] *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, note 28, at 10, para. 26.

[31] *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3) (Decision on the Participation of a Counsel of January 14, 2010), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1370_En&caseId=C72> accessed July 29, 2012.

[32] *The Rompetrol Group N.V. v. Romania*, note 31, pp. 9–10, paras 22–3.

[33] *The Rompetrol Group N.V. v. Romania*, note 31, pp. 7–8, para. 19.

[34] *The Rompetrol Group N.V. v. Romania*, note 31, pp. 9–10, para. 22.

[35] *The Rompetrol Group N.V. v. Romania*, note 31, pp. 6, para. 16.

[36] Bishop, note 18, paras 10–11.

[37] Bishop, note 18, paras 10–11.

[38] Bishop, note 18, paras 10–11.

[39] P Sands, “The ILA Hague Principles on Ethical Standards for Counsel Appearing Before International Courts and Tribunals” (2011) 10 L. & Prac. Int’l Cts. & Tribunals 1, 1–5; P Sands, “Interaction between Counsel and International Courts and Arbitral Tribunals: Ethical Standards for Counsel” in R Wolfrum and I Gätzschmann (eds), *International Dispute Settlement: Room for Innovation?* (Heidelberg, New York, Dordrecht, London: Springer 2012) 127–58.

[40] A Pellet, “The Role of the International Lawyer in International Litigaton” in C Wickremasinghe (ed.), *The International Lawyer as Practitioner* (London: British Institute of International and Comparative Law 2000) 147–50.

[41] P Reichler in “Preparation of Cases before International Courts and Tribunals” (2012) 106 Am. Soc. Int’l L. Proc. 158.

[42] D Bowett, “The Conduct of International Litigation” in D Bowett et al. (eds), *The International Court of Justice: Process, Practice and Procedure* (London: British Institute of International and Comparative Law 1997) 1–20; Pellet, note 40, at 148, also excludes counsel pleading on behalf of their state of nationality from his statistics.

[43] K Highet, “A Personal Memoir of Eduardo Jiménez de Aréchaga” (1994) 88 Am. Soc. Int’l L. Proc. 577, at 579.

[44] Pellet, note 40, at 150–1.

45 Pellet, note 40, at 148.

46 See e.g., Arbitration Agreement between the Government of the Republic of Slovenia and the Government of the Republic of Croatia, November 4, 2009 ITLOS, Rules of the Tribunal, note 9, Art. 43; ICJ Statute, note 8, Art. 39. Article 39 allows the parties to agree to the conduct of proceedings in only one of the court's official languages. Even when such agreements were reached, in practice this did not preclude counsel from pleading in the other language during the oral phase. See MG Kohen, "Art. 39" in A Zimmermann et al. (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012) 917 fn. 46.

47 For more on this see J Crawford and A Pellet, "Anglo-Saxon and Continental Approaches to Pleading Before the ICJ; Aspects des modes continentaux et Anglo-Saxons de plaidoiries devant la C.I.J." in I Buffard et al. (eds), *International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner* (Leiden, Boston, MA: Martinus Nijhoff 2008) 831–69, in particular at 867.

48 Pellet, note 40, at 151–3.

49 Pellet, note 40, at 150.

50 Of course, this does not necessarily entail that they do not in fact possess such qualifications.

51 Cot, note 1.

52 Pellet, note 40, at 158–9.

53 Pellet, note 40, at 149.

54 Cot, note 1, at para. 9.

55 Berman, note 3, at 1087.